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No. — 431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

FLORENCE B. MOSES,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Question presented	2
Statute and Regulations involved	2
Statement	2
Reasons why the writ should be allowed	6
The Court of Appeals has erroneously decided an important question of federal law, involving the meaning of a federal statute of wide application. That question has not been, but should be, settled by this Court	6
Index to Appendices	11
Appendix I	13
Appendix II	18
Appendix III	26
Appendix IV	30

TEXTS OF CITED STATUTE AND REGULATIONS

Statute:	
Internal Revenue Code:	
Sec. 22 (26 U. S. C. 1946 ed., Sec. 22)	13
Sec. 23 (26 U. S. C. 1946 ed., Sec. 23)	14
Miscellaneous:	
Treasury Regulations 111, Sec. 29.22(k)-1	14

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable: The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, reversing a decision, entered November 6, 1952, of the Tax Court of the United States, which had expunged a deficiency in the income taxes of petitioner for the calendar year 1944, as determined by the respondent.

Opinions Below

The findings of fact and opinion of the Tax Court (Appendix II, *infra*) are reported at 18 T. C. 1020. The opinion of the Court of Appeals (Appendix III, *infra*) is reported at 214 F. 2d 912.

Jurisdiction

The judgment of the Court of Appeals (Appendix IV, *infra*) was entered on August 11, 1954. Jurisdiction is conferred on this court by 28 U. S. C. § 1254(1).

Questions Presented

1. Where, as an integral part of the settlement and discontinuance of a separation action then being tried in New York, a written separation agreement was entered into on the explicit premise that the matter of a divorce was wholly out of consideration, and where the husband thereafter obtains a Florida divorce decree, on constructive service, without answer or appearance by the wife, which made no provision for alimony or support and did not refer to or incorporate the separation agreement, are payments thereafter made by the husband pursuant to the agreement includible in the wife's gross income tax under 26 U. S. C. A. § 22(k)?

2. Is the conclusion based on the facts stated in question #1 altered by the circumstance that contained in the separation agreement was a provision that the agreement should survive any divorce decree thereafter obtained?

Statute and Regulations Involved

The relevant provisions of the Statute and Regulations involved are set forth in Appendix I, *infra*.

Statement

The pertinent facts, as found by the Tax Court (Appendix II, *infra*) and not disturbed by the Court of Appeals, are as follows:

Florence B. Moses, the taxpayer (petitioner), resides in Brooklyn, New York, and filed her income tax return for

1944 with the Collector of Internal Revenue for the First District of New York. The taxpayer and her former husband, Albert Moses, now deceased, were married in the State of New York on June 29, 1919. They lived together until October 12, 1943, when Albert Moses left the taxpayer. On November 16, 1943, the taxpayer instituted an action for a legal separation in the Supreme Court of New York for the County of Kings. Her husband appeared by attorney and filed an answer. Following the granting of a motion by the taxpayer for alimony *pendente lite* and counsel fees, the separation action came on for trial on March 8, 1944.

The proceedings were suspended while negotiations looking toward a voluntary separation agreement were carried on. During the discussions which followed, the taxpayer declared that she would not give her husband a divorce. She refused to establish residence in another state and sue her husband for a divorce there. She stated in answer to the suggestion that her husband would move to another state and there commence proceedings, that she would not give her husband a divorce under any circumstances. The parties then agreed that the matter of divorce was out of consideration and that they would work out a voluntary agreement of separation. The trial of the separation action was then adjourned.

During the period of adjournment, the taxpayer was advised by her attorney that, if a decree and award of alimony were obtained by her, failure to make alimony payments could be punished by contempt proceedings but that such alimony payments would be taxable to her. She was also advised that if she entered into a voluntary separation agreement outside court, the payments for support under the agreement could not be enforced through contempt proceedings but that such payments would not be taxable to her. The taxpayer chose to enter into such a voluntary separation agreement. The parties executed a voluntary separation agreement on April 4, 1944, and the separation action in court was discontinued. Among the provisions

of the separation agreement were the following (Appendix II, *infra*):

1. From the date hereof, the parties may and shall continue to live separate and apart for the rest of their natural lives, and each shall be free from interference, authority and control, direct or indirect, by the other as fully as if sole and unmarried. Neither one shall molest, disturb or harass the other. Neither one shall compel the other to live with him, or her, by any legal proceeding or otherwise. Each may, for his or her separate use or benefit, engage in any employment, business or profession which he or she may deem advisable.

2. The Husband shall, so long as he is alive, pay to the Wife, for her support and maintenance, the sum of $346.66 per month, on the 10th day of each and every month, commencing April, 1944, until her death or remarriage.

* * * * *

14. In the event that the Wife shall remarry during the lifetime of the Husband, all her interest in the policies described in both "Schedule A" and "Schedule B" shall immediately cease, and she shall thereupon immediately reassign to the Husband the policies described in "Schedule A".

* * * * *

21. The provisions of this agreement, to the extent that they may be acceptable to the court, may be incorporated in the final judgment or decree obtained in any action hereafter brought by either party against the other for a divorce in any court of competent jurisdiction. Notwithstanding such incorporation, the provisions hereof shall not be merged in any such judgment or decree but shall, in all respects, survive the same.

At the time the separation agreement was executed, Albert Moses was president of the Almo Trading and Importing Company, Inc., a New York corporation doing business in New York. His income amounted to approximately $50,000 annually.

On or about September 14, 1944, Albert Moses instituted a divorce proceeding in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. The taxpayer, in Brooklyn, New York, received a notification to appear in the suit. She was not personally served with the process and she did not appear personally or by attorney in the Florida proceedings. On October 23, 1944, a final decree of divorce, *a vinculo matrimonii*, was granted to Albert Moses by the Florida court. The decree did not make provision for alimony or support nor did it refer to or incorporate the separation agreement between the parties. On October 23, 1944, Albert Moses married one Anna Price and lived in Brooklyn, New York, with his second wife until his death.

On the basis of these facts, the Tax Court concluded that the agreement for voluntary separation was not incident to the divorce obtained by the taxpayer's husband on October 23, 1944, and, accordingly, held that the payments made to the taxpayer under the terms of the voluntary separation agreement after that date were not taxable to her under Section 22(k) of the Internal Revenue Code (Appendix II, *infra*).

Without disturbing any of the fact findings, above recited, of the Tax Court, the Court of Appeals concluded that, as matter of law, section 21 of the separation agreement brought it within the category of an agreement "incident to" the decree, within the sense of the statute (Appendix III, *infra*).

Reasons Why The Writ Should Be Allowed

The Court of Appeals has erroneously decided an important question of federal law, involving the meaning of a federal statute of wide application. That question has not been, but should be, settled by this Court.

A.

Until the Court of Appeals reversed the Tax Court in the instant case, no case had ever held that, notwithstanding the wife's expressed, unrelenting, implacable stand against divorce (so found by the Tax Court [Appendix II, at pp. 19, 22, *infra*] and expressly reaffirmed by the Court of Appeals [Appendix III, at pp. 27, 29, *infra*]), an agreement for support entered into on the explicit premise that the matter of divorce was out of consideration (so found by the Tax Court here [Appendix II, at p. 19, *infra*] and implicitly reaffirmed by the Court of Appeals), may be converted into an agreement incident to a decree by the simple device of the husband's procurement of a unilateral, *ex parte* "quickie" divorce.

Such a view, it is submitted, places the wife at the mercy of the husband at the instant she signs an agreement of support, puts a premium on duplicity and breach of faith and runs counter to the fundamental concept that one ought not to profit by his own wrong.

Moreover, to allow a divorce obtained in such circumstances to transform an agreement which was *not* incident to the decree into one which *is*, and thus, to unilaterally shift the tax burden on the support payments from husband to wife by a crude species of double-dealing and self-help, does violence to the concept that it is not within the power of either party acting alone and against the will of the other to destroy or change the agreement.

A divorce-minded husband may, upon a profession of domicile and "cause", snap up a colorably valid decree of divorce in a sister state—frequently far enough removed, or in any event so complaisant in its divorce policy, as to discourage contest there. But it is intolerable to normal notions of justice that the process of unilateral revision of marital status should include, in effect, the unilateral revision of an antecedent contract for the support of the wife.

B.

All of the cases cited by the Court of Appeals involved agreements of pre-1942 vintage. But prior to January 1, 1942 (the effective date of the statute here involved) alimony payments, whether pursuant to agreement or decree, were not taxable to the wife and not deductible by the husband.

Obviously, then, in those days it was a matter of supreme unconcern to a wife whether a support agreement was deemed to be linked with a divorce thereafter obtained. For, in any event, the *payor*—not the recipient—bore the burden of the tax on the stipulated or decreed payments.

Enactment of the statute, with its reversal of then existing concepts of alimony taxation, posed new problems for the Bar. Theretofore a lawyer was not called upon to consider the tax aspect, for, as things stood then, the law was clear that, absent agreement, the wife paid no tax on the alimony and the husband took no deduction for it.

However, starting in 1942, any lawyer who undertook to represent a wife in connection with a matrimonial matter was faced with the imperative necessity for considering the impact of the statute on such amounts as she might receive, and to fairly and clearly advise her of the tax consequences incident to various procedures.

Had petitioner's separation suit gone to decree, she would, of course, have been taxable on the decreed alimony,

which latter would have been fixed by reference to her husband's $50,000 annual income (Appendix II, at p. 20, *infra*) in such an amount as would have accommodated the impact of federal and state income taxes thereon. It was established, however, without contradiction, and so both the Tax Court and the Court of Appeals found (Appendix II, at p. 19 and Appendix III, at p. 27, *infra*) that she chose instead to take $346.65 per month by *agreement* after being told by her counsel that, while she would thus forego the remedy of punishing her husband for contempt, she would take the stipulated amount free of tax.

Here, then, was a situation where the impact of the statute was *directly* considered and a choice *deliberately* made so as to keep the stipulated amount free from tax. Nevertheless, the Court of Appeals ruled that in the very act of reaching this resolution and insuring this result, petitioner in effect nullified it!

This curious conclusion of the Court of Appeals was reached on the sole basis of section 21 of the separation agreement (Appendix II, at p. 20, *infra*), which provided, in substance, that the provisions of the agreement were to survive any decree of divorce thereafter obtained. In the Court of Appeals' view, "these provisions made it abundantly clear that the possibility of a divorce was realized by (petitioner) when she executed the agreement, however much she may have been opposed to having such a thing accomplished" (Appendix III, at p. 29, *infra*). Hence, the Court of Appeals concluded, so long as there was the *possibility,* however remote, of a divorce, the agreement was inevitably incident to the subsequent decree.

We submit that the very result reached by the Court of Appeals proclaims that that Court, and not the Tax Court, has misread the statute. Obviously, under the present interstate divorce rule, enunciated by this court in 1942, there is always the *possibility* of the unilateral con-

version of a separation status into a divorce status. If *that* is the test of whether an agreement falls within the statute, then every separation agreement is an agreement *potentially* incident to a divorce; and that would be so regardless of whether it contained a provision such as section 21 of the present agreement. Such an approach to the problem is, we submit, plainly unrealistic.

C.

The statute in question went into effect in 1942. Since that time numerous cases, directly involving the application of the statute, have passed through the Tax Court. A score or more have reached the Court of Appeals, mainly in the Second Circuit. So far as we are aware, no case involving the meaning and application of the statute has ever been decided here.

It is common knowledge that thousands of separation agreements are entered into each year. Surely not all of them are "incident to" such divorce decrees as are thereafter obtained. But under the "possibility of divorce" test laid down by the Court of Appeals, there can be *no* rational exception whatever under the statute, since, as noted, there is the latent possibility in each instance that one or the other of the contracting parties may obtain a divorce wholly without the acquiescence of the opposite spouse.

Consequently, with a large mass of cases still to be processed under the statute, the particular authorities will, if the instant decision of the Court of Appeals is permitted to stand as law, have no alternative but to apply it as a virtual rubber stamp to all cases arising under the statute.

In these circumstances, we submit that, entirely apart from the plainly demonstrated error of the Court of Appeals in the instant case—grievous enough in its economic

effect upon petitioner—the public interest implicit in the inevitable impact of the decision below upon the numerous cases arising under the statute, and still to be decided, amply warrants the granting of the requested writ.

Dated, New York, N. Y.,
October 25, 1954.

Respectfully submitted,

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INDEX TO APPENDICES

		PAGE
I.	Texts of Statute and Regulations Involved ...	13
II.	Findings and Opinion of the Tax Court	18
III.	Opinion of the Court of Appeals	26
IV.	Judgment of the Court of Appeals	30

APPENDIX I

(Texts of Statute and Regulations Involved)

Internal Revenue Code:

Sec. 22. GROSS INCOME.

* * * * *

(k) [as added by Section 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, Etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. Installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument shall not be considered periodic payments for the purposes of this subsection; except that an installment payment shall be considered a periodic payment for the purposes of this subsection if such principal sum, by terms of the decree or instrument, may be or is to be paid within a period ending more than 10 years from the

date of such decree or instrument, but only to the extent that such installment payment for the taxable year of the wife (or if more than one such installment payment for such taxable year is received during such taxable year, the aggregate of such installment payments) does not exceed 10 per centum of such principal sum. For the purposes of the preceding sentence, the portion of a payment of the principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be considered an installment payment for the taxable year in which it is received. (In cases where such periodic payments are attributable to property of an estate or property held in trust, see section 171(b).)

* * * * *

(26 U. S. C. 1946 ed., Sec. 22.)

Sec. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(u) [as added by Section 120(b) of the Revenue Act of 1942, *supra*] *Alimony, Etc., Payments.*—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

* * * * *

(26 U. S. C. 1946 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.22(k)-1. *Alimony and Separate Maintenance Payments—Income to Former Wife.*—(a) *In general.*—Section 22(k) provides rules for treatment in certain cases of payments in the nature of

or in lieu of alimony or an allowance for support as between spouses who are divorced or legally separated under a court order or decree. For convenience, the payee spouse will hereafter in this section of the regulations be referred to as the "wife" and the spouse from whom she is divorced or legally separated as the "husband." See section 3797(a)(17).

In general, section 22(k) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her after the decree of divorce or of separate maintenance. Such periodic payments may be received from either of the two following sources:

(1) In discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband, or

(2) Attributable to property transferred (in trust or otherwise) in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband.

The obligation of the husband must be imposed upon him or assumed by him (or made specific) under either of the following:

(1) A court order or decree divorcing or legally separating the husband and wife, or

(2) A written instrument incident to such divorce or legal separation.

The periodic payments received by the wife attributable to property so transferred and includible in her income are not to be included in the gross income of the husband. See also section 29.171-1 in cases where such periodic payments are attributable to property held in trust.

The purpose and effect of section 22(k) may be illustrated, in general, by the following examples, in which it is assumed that the husband and wife make their income tax returns on the calendar year basis:

Example (1). W sues H for divorce in 1942. The court awards W temporary alimony of $25 a week pending the final decree. On September 1, 1942, the court grants W a divorce and awards her $200 a month permanent alimony. No part of the $25 a week temporary alimony received prior to the decree is includible in W's income under section 22(k), but the $200 a month received during the balance of 1942 by W is includible in her income for 1942. Under section 23(u), H is entitled to deduct such $200 payments from his income.

Example (2). W files suit for divorce from H. In consideration of W's promise to relinquish all marital rights and not to make public H's financial affairs, H makes a legally binding promise in writing to W to pay to her $200 a month if a final decree of divorce is granted without any provision for alimony. Accordingly, W does not request alimony and no provision for alimony is made under a final decree of divorce entered prior to 1942. During 1942, H pays W $200 a month, pursuant to the promise. The $2,400 thus received by W is includible in her gross income under the provisions of section 22(k). Under section 23(u), H is entitled to a deduction of $2,400 from his gross income.

Example (3). H and W enter into an antenuptial agreement, under which, in consideration of W's relinquishment of all marital rights (including dower) in H's property, and, in order to provide for W's support and household expenses, H promises to pay W $200 a month for her life. Ten years after their marriage, W sues H for divorce but does not ask for or obtain alimony because of the provision already made for her support in the antenuptial agreement. Likewise, the divorce decree is silent as to such agreement and H's obligation to support W. Section 22(k) does not apply to such a case. If, however, the decree were modified so as to refer to the antenuptial agreement, or if, at the time of the divorce, reference had been made to the antenuptial agreement in the court's decree or in a written instrument incident to the divorce, section 22(k) would require the inclusion of the payments received by W after the decree in her income for taxable years

beginning after December 31, 1941. (As to including such payments in the wife's income, if made by a trust created under the antenuptial agreement, regardless of whether referred to in the decree or a later instrument, see section 29.171-1.)

Section 22(k) applies only where the legal obligation being discharged arises out of the family or marital relationship in recognition of the general obligation to support, which is made specific by the instrument or decree. Thus, section 22(k) does not apply to that part of any periodic payment which is attributable to the repayment by the husband of, for example, a *bona fide* loan previously made to him by the wife, the satisfaction of which is specified in the divorce decree as a part of the general settlement between the husband and wife.

Periodic payments are includible in the wife's income under section 22(k) only for the taxable year in which received by her. As to such amounts, the wife is to be treated as if she makes her income tax returns on the cash receipts and disbursements basis, regardless of whether she normally makes such returns on the accrual basis. * * *

* * * * *

APPENDIX II

(Findings and Opinion of the Tax Court)

THE TAX COURT OF THE UNITED STATES

FLORENCE B. MOSES, Petitioner, *v.* COMMISSIONER OF INTERNAL REVENUE, Respondent.	DOCKET #27160

The respondent determined an income tax deficiency against the petitioner for the year 1944 in the amount of $904.81. The sole question at issue is whether payments received by the petitioner under a separation agreement with her husband were made pursuant to a written instrument incident to a divorce decree. The respondent has conceded that only those payments received after entry of the divorce decree are in issue.

FINDINGS OF FACT

Florence B. Moses, the petitioner, resides in Brooklyn, New York, and filed her income tax return for 1944 with the collector of internal revenue for the first district of New York. Petitioner and her former husband, Albert Moses, now deceased, were married in the State of New York on June 29, 1919. They lived together until October 12, 1943, when Albert Moses left the petitioner. On November 16, 1943, the petitioner instituted an action for a legal separation in the Supreme Court of New York for the County of Kings. Her husband appeared by attorney and filed an answer. Following the granting of a motion by petitioner for alimony *pendente lite* and counsel fees, the separation action came on for trial on March 8, 1944.

The proceedings were suspended while negotiations looking toward a voluntary separation agreement were carried on. During the discussions which followed, the petitioner declared that she would not give her husband a divorce. She refused to establish residence in another state and sue her husband for a divorce there. She stated in answer to the suggestion that her husband would move to another state and there commence proceedings, that she would not give her husband a divorce under any circumstances. The parties then agreed that the matter of the divorce was out of consideration and that they would work out a voluntary agreement of separation. The trial of the separation action was then adjourned.

During the period of adjournment the petitioner was advised by her attorney that, if a decree and award of alimony were obtained by her, failure to make alimony payments could be punished by contempt proceedings but that such alimony payments would be taxable to her. She was also advised that if she entered into a voluntary separation agreement outside court the payments for support under the agreement could not be enforced through contempt proceedings but that such payments would not be taxable to her. The petitioner chose to enter into such a voluntary separation agreement. The parties executed a voluntary separation agreement on April 4, 1944, and the separation action in court was discontinued. Among the provisions of the separation agreement were the following:

> 1. From the date hereof, the parties may and shall continue to live separate and apart for the rest of their natural lives, and each shall be free from interference, authority and control, direct or indirect, by the other as fully as if sole and unmarried. Neither one shall molest, disturb or harass the other. Neither one shall compel the other to live with him, or her, by any legal proceeding or otherwise. Each may, for his or her separate use or benefit, engage in any employment, business or profession which he or she may deem advisable.

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The proceedings were suspended while negotiations looking toward a voluntary separation agreement were carried on. During the discussions which followed, the petitioner declared that she would not give her husband a divorce. She refused to establish residence in another state and sue her husband for a divorce there. She stated in answer to the suggestion that her husband would move to another state and there commence proceedings, that she would not give her husband a divorce under any circumstances. The parties then agreed that the matter of the divorce was out of consideration and that they would work out a voluntary agreement of separation. The trial of the separation action was then adjourned.

During the period of adjournment the petitioner was advised by her attorney that, if a decree and award of alimony were obtained by her, failure to make alimony payments could be punished by contempt proceedings but that such alimony payments would be taxable to her. She was also advised that if she entered into a voluntary separation agreement outside court the payments for support under the agreement could not be enforced through contempt proceedings but that such payments would not be taxable to her. The petitioner chose to enter into such a voluntary separation agreement. The parties executed a voluntary separation agreement on April 4, 1944, and the separation action in court was discontinued. Among the provisions of the separation agreement were the following:

> 1. From the date hereof, the parties may and shall continue to live separate and apart for the rest of their natural lives, and each shall be free from interference, authority and control, direct or indirect, by the other as fully as if sole and unmarried. Neither one shall molest, disturb or harass the other. Neither one shall compel the other to live with him, or her, by any legal proceeding or otherwise. Each may, for his or her separate use or benefit, engage in any employment, business or profession which he or she may deem advisable.

2. The Husband shall, so long as he is alive, pay to the Wife, for her support and maintenance, the sum of $346.66 per month, on the 10th day of each and every month, commencing April, 1944, until her death or remarriage.

• • • • •

14. In the event that the Wife shall remarry during the lifetime of the Husband, all her interest in the policies described in both "Schedule A" and "Schedule B" shall immediately cease, and she shall thereupon immediately reassign to the Husband the policies described in "Schedule A."

• • • • •

21. The provisions of this agreement, to the extent that they may be acceptable to the court, may be incorporated in the final judgment or decree obtained in any action hereafter brought by either party against the other for a divorce in any court of competent jurisdiction. Notwithstanding such incorporation, the provisions hereof shall not be merged in any such judgment or decree but shall, in all respects, survive the same.

At the time the separation agreement was executed, Albert Moses was president of the Almo Trading & Importing Co., Inc., a New York corporation doing business in New York. His income amounted to approximately $50,000 annually.

On or about September 14, 1944, Albert Moses instituted a divorce proceeding in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. Petitioner, in Brooklyn, New York, received a notification to appear in the suit. She was not personally served with process and she did not appear personally or by attorney in the Florida proceedings. On October 23, 1944, a final decree of divorce, *a vinculo matrimonii*, was granted to Albert Moses by the Florida court. The decree did not make provision for alimony or support nor did it refer to or incorporate the separation agreement between the parties. On October 23, 1944, Albert Moses married one Anna Price

and lived in Brooklyn, New York, with his second wife until his death.

Albert Moses made payments under the voluntary separation agreement of $693.32 to the petitioner during the months of November and December, 1944 following the entry of the Florida divorce decree. The respondent determined that the amount of $2,773.28 paid to petitioner by Albert Moses in 1944 was taxable to her. By reason of respondent's concession, a lesser amount is now claimed.

The agreement for voluntary separation was not incident to the decree of divorce or of separate maintenance, and was not incident to such divorce or legal separation.

OPINION

VAN FOSSAN, *Judge:*

The only issue is whether the payments received by petitioner from Albert Moses in November and December, 1944 were taxable to the petitioner under the provisions of section 22(k) of the Internal Revenue Code.[1] The Florida divorce decree obtained by Albert Moses did not provide for alimony nor did it incorporate the provisions of the voluntary separation agreement. Thus, the payments received by petitioner were not imposed by a decree

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[1] SEC. 22. GROSS INCOME.

* * * * * *

(k) Alimony, etc., Income.—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband.

of divorce or separation. The New York separation action had been discontinued when the voluntary separation was agreed upon. The only remaining basis for taxing petitioner is that the obligation to make the payments was imposed under a written instrument incident to a divorce or separation. It is contended by respondent that the voluntary agreement executed on April 4, 1944, is incident to the Florida divorce decree entered on October 23, of the same year. At the time the separation agreement was entered into and prior thereto, discussions pertaining to a divorce had occurred. Albert Moses wished to obtain a divorce as is evidenced by his proposals to petitioner regarding the institution of divorce proceedings. The petitioner rejected these suggestions and stated that she would not give her husband a divorce under any circumstances. She refused to sue him for divorce in New York or elsewhere or to consent to a divorce. Following this adamant stand by petitioner, Albert Moses agreed to a voluntary separation and the legal proceedings were discontinued.

It is evident from the conduct of the parties that the voluntary agreement was not entered into as an incident to a divorce but as a substitute for a divorce or legal separation. The petitioner was advised by counsel as to his opinion of the consequences of the separation agreement and she accepted this alternative to a legal separation or divorce proceeding. The evidence points not to the conclusion that a divorce was contemplated by the parties entering into the agreement but rather that the voluntary separation agreement eliminated the issue of a divorce.

More than six months later Albert Moses instituted divorce proceedings in the State of Florida. Without entering into the question of the validity of this divorce we are of the firm opinion that the separation agreement of April 4, 1944, was not incident to the Florida divorce. The divorce decree obtained in Florida was the result of the action of Albert Moses. He wished to marry again but

the discontinued proceedings brought by his wife or [for] legal separation and the voluntary separation agreement entered into did not provide a status for remarriage. When a divorce was obtained in Florida, Albert Moses remarried the same day.

The evidence does not indicate that the parties entering into the agreement contemplated divorce proceedings as was true in *Bertram G. Zilmer,* 16 T. C. 365. If plans for a divorce following the agreement were held by Albert Moses, he did not bring them to light. The fact that one party may be considering the possibility of a divorce is not sufficient to make the voluntary separation agreement an incident to a divorce later obtained. *Cecil A. Miller,* 16 T. C. 1010. Although there is no requirement of positive proof that both parties jointly and positively anticipated legal divorce or separation at the moment they signed the agreement, *Izrastzoff* v. *Commissioner,* 193 F. 2d 625, affirming *Estate of Daniel G. Reid,* 15 T. C. 573, the actions and conduct of the parties, the time between agreement and divorce proceedings, and the participation of the parties in obtaining a divorce are elements and factors to be considered.

Upon examination of the evidence, we are left with the conclusion that if a divorce had been made the consideration for entering into the voluntary separation agreement, the petitioner would not have executed the agreement and would have continued the separation proceedings she had commenced. In this respect, the facts presented here differ from those of *Robert Wood Johnson,* 10 T. C. 647, wherein the taxpayer's wife assured him that she would institute a divorce suit if he would sign the agreement there in question. Upon the same basis, *George T. Brady,* 10 T. C. 1192, is distinguishable. The subject of a divorce was under discussion prior to the execution of the separation agreement but the result of that discussion was that the petitioner would not consent to a divorce. The provisions of the voluntary agreement were not adopted in the divorce

proceedings to which petitioner was not a party. The voluntary separation agreement was not employed by the court granting the divorce in establishing the legal and economic relationships between the parties as was true in *Lerner* v. *Commissioner,* 195 F. 2d 296.

The respondent contends that section 21 of the agreement demonstrates that both husband and wife contemplated a divorce. That section declared that the provisions of the agreement may be incorporated in the final judgment or decree of divorce in any action brought by either party. This section also states that the provisions of the agreement shall survive any decree notwithstanding this incorporation. This provision clearly is concerned with the survival of the provisions of the separation agreement in the event that a divorce is obtained by either party. It makes provision against the merger of the terms of the agreement in that event. A provision for a contingency such as this in an agreement does not, without more, demonstrate that the agreement is incidental to the occurrence of an event which is no more than a possibility. It was possible that petitioner's husband might obtain a divorce decree despite her refusal to be a party to such a proceeding. The possibility also existed that the petitioner might change her mind about a divorce. Similarly, we do not believe that either section 2 or section 14 of the agreement demonstrates the required relationship between the agreement and the later divorce. These provisions limit support payments and petitioner's interest in insurance policies to the period in which she remains alive and does not remarry during her husband's lifetime. They do not indicate that a divorce is to come at a later date. These sections merely set forth the consequences if certain contingencies occur.

The facts presented here provide a much stronger basis for the conclusion that the agreement was not incident to the divorce than did the situation found in *George J. Feinberg,* 16 T. C. 1485, reversed, *Feinberg* v. *Commissioner,* —— F. 2d —— (C. A. 3, August 13, 1952), where we had

reached the same conclusion. We believe the facts of the petitioner's positive refusal to consent to a divorce, the execution of the agreement [action] in lieu of a divorce or legal separation, the discontinuance of the separation agreement, and the conduct of petitioner and her husband sufficiently distinguish the facts here present from the *Feinberg* case. The facts lead us to the conclusion that the agreement of April 4, 1944, was not incident to the Florida divorce decree of October 23, 1944. Any other decision would run counter to the clear weight of the evidence.

Decision will be entered under Rule 50.

APPENDIX III

(Opinion of the Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 183—October Term, 1953.

(Argued May 11, 1954 Decided August 11, 1954.)

Docket No. 22925

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

against

FLORENCE B. MOSES,
Respondent.

BEFORE:

CHASE, *Chief Judge,*
HINCKS and HARLAN, *Circuit Judges.*

Petition to review a decision of the Tax Court expunging a deficiency in the income taxes of the respondent for the calendar year 1944 as determined by the Commissioner of Internal Revenue. Reversed.

H. BRIAN HOLLAND, Assistant Attorney General,
ELLIS N. SLACK,
A. F. PRESCOTT,
DUDLEY J. GODFREY, JR.,
Special Assistants to the Attorney General,
for the Petitioner.

BARRON, RICE & ROCKMORE, *Attorneys for Respondent,* George P. Halperin and Bernard S. Barron, of Counsel.

CHASE, *Chief Judge:*

The broad question presented is whether payments made to the respondent in the taxable year pursuant to a written separation agreement she had made with her husband, who later obtained a divorce from her, are includible in her gross income under Section 22(k) of the Internal Revenue Code, 26 U. S. C. A. § 22(k). The decisive question is whether this written agreement was "incident to such divorce" within the meaning of that phrase in the statute, since in other respects the applicability of the above mentioned section to make the payments includible in the gross income of the respondent is plain and uncontested.

The respondent was married to Albert Moses on June 29, 1919, and lived with him in New York until October 12, 1943, when he left her, and the next month she brought an action for a legal separation from him in the Supreme Court of Kings County, New York. After trial of that action had commenced, it was halted while the parties attempted to work out a voluntary separation agreement. He wanted the marriage dissolved by divorce but she was adamant against that and his efforts in that regard were abandoned. They desired, however, to continue their efforts to agree upon the terms of a separation and the court proceedings were adjourned to give them further opportunity to do so. During the adjournment, the respondent was advised by her attorney that if she elected to proceed with her court action and was successful in getting a decree of separation and an award of alimony her husband could be punished for contempt if he failed to pay the alimony as decreed, but that such payments would be taxable to her. He also advised her that if she entered into a voluntary separation agreement, the failure of her husband to make any payments for her support which became due under the agreement would not subject him to contempt proceedings nor would any payments he made be taxable to her. She chose to agree on the terms of a voluntary separation which was reduced to writing and executed by her and by her husband on April 4, 1944.

She did not do so in contemplation of any divorce proceedings being instituted either by herself or her husband. The only reference in the agreement to the possibility of a divorce is the following:

> "21. The provisions of this agreement, to the extent that they may be acceptable to the court, may be incorporated in the final judgment or decree obtained in any action hereafter brought by either party against the other for a divorce in any court of competent jurisdiction. Notwithstanding such incorporation, the provisions hereof shall not be merged in any such judgment or decree but shall, in all respects, survive the same."

After this agreement was made the action which the respondent had brought in the New York court was discontinued. Her husband, however, brought an action for an absolute divorce from her in a Florida court on September 14, 1944. She then lived in Brooklyn, N. Y., and was given notice of the suit, though not personally served with process, and neither appeared by herself nor by attorney in the Florida suit. Her husband obtained a final decree of absolute divorce from her on October 23, 1944, and was married to another woman the same day. Two of the payments he made to her in 1944 pursuant to their separation agreement were made after this decree was entered. The Tax Court held them not taxable to her.

Were it a condition precedent to the applicability of Section 22(k) to prove that when she made the agreement it was done as part of an understanding with her husband that it would be followed by a suit for a divorce, we should not disagree with the decision of the Tax Court. But we have held otherwise in *Izrastzoff* v. *Commissioner*, 193 F. 2d 625 and *Lerner* v. *Commissioner*, 195 F. 2d 296. See also *Newton* v. *Pedrick*, 2 Cir., —— F. 2d —— dec'd April 28, 1954; *Feinberg* v. *Commissioner*, 3 Cir., 198 F. 2d 260 and *Commissioner* v. *Miller*, 9 Cir., 199 F. 2d 597; *Stewart* v. *Rothensies*, 114 Fed. Supp. 497.

As in the *Lerner* case, the issue in the *Feinberg* case was the right of the former husband to take deductions for payments pursuant to a separation agreement under Section 23(u), but the same reasoning is applicable and on the facts the case is so closely in point as to be indistinguishable.

Here the execution of the separation agreement was followed by the husband's Florida divorce within six months. It was by its terms to survive a divorce decree, whether incorporated in it or not, and these provisions make it abundantly clear that the possibility of a divorce was realized by the respondent when she executed the agreement, however much she may have been opposed to having such a thing accomplished. The question of alimony is germane to such a proceeding and where, as here, the provisions of the agreement were apparently a substitute for alimony which was satisfactory to the respondent, since she did not appear in the divorce action and make any attempt to have them increased, the nexus between the agreement and the divorce decree needed to make Section 22(k) applicable is present. What we said in the *Lerner* case, *supra*, at page 298 is equally pertinent here.

> "The term 'written instrument incident to a divorce' was designed, we think, only to insure adequate proof of the existence of the obligation when divorce has occurred, * * * So where the payments obviously take the place of alimony and otherwise satisfy the stringent requirements of I. R. C. § 22(k), although not formally incorporated into the decree they should not be denied effect under the statute merely because there is no evidence that divorce and settlement were not contemporaneously planned and carried out."

Decision reversed and cause remanded.

APPENDIX IV

(Judgment of the Court of Appeals)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of August, one thousand nine hundred and fifty four.

PRESENT:

HON. HARRIE B. CHASE, *Chief Judge*
HON. CARROLL C. HINCKS,
HON. JOHN M. HARLAN,
Circuit Judges

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

FLORENCE B. MOSES,
Respondent.

APPEAL FROM THE TAX COURT OF THE UNITED STATES

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said The Tax Court of the United States be and it hereby is reversed

and action remanded in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

A. DANIEL FUSARO

By RALPH C. CURCIO, Clerk
DEPUTY CLERK